

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: **October 5, 2018**

CLAIM NOS. 201602466 & 201602269

JET COAL, LLC

PETITIONER

VS.

**APPEAL FROM HON. BRENT DYE,  
ADMINISTRATIVE LAW JUDGE**

MICHAEL ALLEY  
And HON. BRENT DYE,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

\* \* \* \* \*

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

**RECHTER, Member.** Jet Coal, LLC appeals from the June 8, 2018 Opinion, Award and Order and the June 27, 2018 Order rendered by Hon. Brent Dye, Administrative Law Judge (“ALJ”). The ALJ determined Michael Alley sustained cumulative trauma injuries to his neck and knees, but failed to prove injuries to his shoulders, arm/wrists, legs/feet, or low back. On appeal, Jet Coal challenges the

determination Alley's work contributed to his cumulative trauma injury, and argues the ALJ erred in considering whether he suffered pre-existing, active neck and knee conditions. Jet Coal also claims Alley was not its employee on the date of manifestation of his cumulative trauma injuries. For the reasons set forth below, we affirm.

Alley filed his claim on October 14, 2016, alleging cumulative trauma injuries to his back, shoulders, neck, arms, wrists, legs, knees, and feet, complicated by depression and anxiety. Alley also filed a claim for occupational hearing loss with a last exposure on June 22, 2016. This appeal concerns only the ALJ's findings with respect to Alley's claims for neck and knees.

Alley testified he has worked in the mining industry for thirty years, primarily underground as a roof bolter. His work required constant reaching overhead and looking up while operating the roof bolter. He began to experience shoulder, neck, arm, wrist, knees, leg, and foot pain fifteen years ago. Alley began working for Jet Coal in early May 2016. He testified his pain worsened during his employment with Jet Coal due to the strenuous nature of the daily tasks. Just a few months after being hired by Jet Coal, Alley was laid off on June 22, 2016. However, he stated he would have quit if he had not been laid off. Alley has not worked since June 2016. His condition did not improve after he ceased working.

Dr. Debra Hall examined Alley on May 19, 2016. He complained of low back, neck, and bilateral foot pain. Alley had full range of motion of the neck, but had difficulty turning his head to the right. Dr. Hall diagnosed cervical and

lumbar degenerative disc disease, chronic pain, peripheral neuropathy and depression.

Dr. Eric Akers, D.C. evaluated Alley on December 22, 2016. Dr. Akers noted a significant decrease in cervical range of motion, including rotation, flexion, and extension. Alley had increased pain with flexion and rotation. Dr. Akers noted moderate cervical spasm.

Dr. David Muffly performed an independent medical evaluation (“IME”) on January 12, 2017. Dr. Muffly diagnosed mild cervical degenerative changes, normal bilateral knee examinations and x-rays. He found no sign of cumulative trauma and stated objective testing does not demonstrate any excessive degenerative change. He opined Alley’s mild degenerative change is consistent with his age. Dr. Muffly assigned a 0% impairment rating for the cervical and bilateral knee conditions. Alley did not require any medical treatment and should be weaned from opioid medications. Dr. Muffly did not assign restrictions and determined Alley could return to his prior occupation.

Dr. Anbu Nadar performed an IME on September 5, 2017. Dr. Nadar noted a history of thirty years of mining employment with ten years in low coal. His work required a lot of bending, twisting, kneeling and crawling. Alley reported neck and back pain for several years. Dr. Nadar reviewed medical records from Drs. Hall and Akers, as well as a cervical MRI in February 2016. The MRI revealed degenerative changes without disc herniation. On examination, Alley had reduced cervical range of motion and tenderness without spasm. Alley had full range of motion of the knees with no swelling or effusion in the right knee. However, Dr.

Nadar found patellar grinding in both knees, in addition to painful crepitus in the left knee. Dr. Nadar diagnosed chronic lumbar and cervical strain with radiculopathy, and bilateral patellofemoral arthrosis.

Regarding causation, Dr. Nadar stated, “the work incidents have caused permanent physical change to soft tissues.” He noted Alley had cumulative trauma from multiple injuries suffered over the years. Dr. Nadar restricted Alley from heavy lifting, frequent bending, twisting, turning, kneeling, and crawling. He assigned a 5% impairment rating for the cervical condition and 2% impairment ratings for each knee pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition (“AMA Guides”). He indicated Alley did not have an active impairment prior to this injury. Dr. Nadar concluded Alley does not have the physical capacity to return to the type of work performed at the time of the injury.

The ALJ found Alley did not sustain compensable shoulder, arm/wrist, foot, low back or psychological injuries. Relying on Dr. Nadar’s opinion and Alley’s testimony, he determined Alley sustained a compensable cumulative trauma injury to his neck. The ALJ noted Alley had to constantly look up and work with his neck bent, twisted and turned in awkward positions. While the ALJ acknowledged the cervical MRI did not reveal any herniated discs, it did reveal degenerative changes and disc bulges. Dr. Nadar diagnosed a chronic cervical strain based on pain and reduced range of motion on examination. The ALJ further noted Dr. Hall documented that Alley experienced neck pain and difficulty turning his

head. Based on this proof, the ALJ determined Alley's job duties aggravated his degenerative changes.

To conclude Alley suffered cumulative trauma injuries to his knees, the ALJ again relied upon Dr. Nadar's opinion and Alley's testimony. The ALJ noted working in low coal required duck walking, crawling, bending, kneeling, and stooping. These positions required Alley to bend his knees, placing stress on them. Alley testified he also had to shovel the beltline, occasionally while on his knees. Dr. Nadar's examination revealed bilateral patellar grinding and patellofemoral crepitus. He diagnosed bilateral knee arthrosis. Relying on Alley's testimony and Dr. Nadar's opinion, the ALJ was convinced the stress and strain over Alley's thirty-year career produced bilateral knee injuries. He was further convinced Alley's job duties aggravated his degenerative changes, producing his bilateral knee injuries.

Turning next to the question of pre-existing, active impairment, the ALJ found no evidence Alley's compensable neck and bilateral shoulder (corrected on reconsideration to reflect injury to the knees) conditions were impairment ratable immediately before he last worked, or that a non-work-related condition/injury caused the alleged prior impairment. The ALJ determined Alley's manifestation date is September 5, 2017, the first date a physician concretely diagnosed gradual injuries, and advised Alley his repetitive work duties caused them.

Jet Coal filed a petition for reconsideration, making essentially the same arguments it raises on appeal. In his June 27, 2018 Order, the ALJ reaffirmed his finding that Alley's job duties aggravated his cervical degenerative changes and bilateral knee degenerative changes and arthrosis. The ALJ found the thirty-year

work history, including the last work with Jet Coal, caused these injuries and he again pointed to Dr. Nadar's opinion.

In response to Jet Coal's argument that Alley suffered a pre-existing, active condition, the ALJ provided the following analysis, citing Hale v. CDR Operations, Inc., 474 S.W.3d 129 (Ky. 2015):

Under Hale, the claimant must prove his last employment's job duties, as well as the ones he performed during his working career, produced and contributed to a cumulative trauma injury. The Plaintiff satisfied the standard. First, the Plaintiff demonstrated that his last employment required extremely repetitive motions and heavy work. Secondly, the Plaintiff demonstrated performing these motions and activities caused and increased his symptoms. Third, the Plaintiff's expert, Dr. Nadar, opined the Plaintiff's work, which the ALJ found, and inferred, meant the Plaintiff's entire working career (including his last employment), caused and contributed to his injuries. The Plaintiff met the appropriate standard.

The ALJ found there is no credible evidence that a non-work-related injury or condition caused Alley's impairment rating, and no portion of the rating is time barred. Further, the ALJ noted Dr. Nadar had indicated there was no prior active impairment before the injury.

On appeal, Jet Coal first argues the ALJ erred in his analysis of the evidence. It maintains the evidence from Drs. Nadar and Hall does not establish that Alley's work at Jet Coal caused, accelerated or exacerbated his degenerative conditions from a dormant condition from an objective standpoint. It notes Alley was admittedly symptomatic prior to his employment with Jet Coal and that diagnostic studies already had revealed degenerative changes. No comparison was

made of the changes on diagnostic studies between the pre and post-employment condition. Thus, it contends the ALJ merely found symptoms and degenerative changes in the cervical spine, not that the changes were caused, aroused or accelerated by the work with Jet Coal. Because Dr. Nadar did not specifically address any of those requirements, nor did he diagnose an arousal of degenerative changes, Jet Coal argues his opinion is insufficient to support the award. Without Dr. Nadar's opinion, Jet Coal contends the ALJ's decision is based solely on Alley's complaints of symptoms, which are not objective medical findings as defined in KRS 342.0011(33).

Alley, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was successful in that burden, the question on appeal is whether substantial evidence supports the ALJ's determination. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). Causation is a factual issue to be determined within the discretion of the ALJ as fact-finder. Union Underwear Co. v. Scarce, 896 S.W.2d 7 (Ky. 1995). Medical causation must be proven by medical opinion within "reasonable medical probability." Lexington Cartage Company v. Williams, 407 S.W.2d 395 (Ky. 1966). In addition, although objective medical evidence must support a harmful change diagnosis, it is unnecessary to prove

causation of any injury through objective medical findings. Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001).

We are convinced the ALJ properly understood and adequately analyzed the evidence in reaching his conclusions. The ALJ first determined that Alley had met his burden of proving work-related injuries to his neck and knees. Our role in reviewing this determination is not to re-weigh the evidence. Rather, we are limited to determining whether substantial evidence supports the finding that Alley sustained cumulative trauma injuries to his neck and knees.

“Injury” is defined in KRS 342.0011(1) as a work related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment, which proximately causes a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(33) defines “objective medical findings” as information gained through direct observation and testing of the patient, applying objective or standardized methods. In Gibbs v. Premier Scale Company, 50 SW3d 754 (Ky. 2001), the Kentucky Supreme Court held that a diagnosis of a harmful change may comply with the requirements of KRS 342.0011(1) and (33) if it is based upon symptoms which are documented by means of direct observation and/or testing applying objective or standardized methods.

Here, Dr. Nadar reviewed records and diagnostic studies, and conducted a physical examination and testing. His findings were documented by means of direct observation and/or testing applying objective or standardized methods. He found Alley’s work produced a permanent change in soft tissues. Dr.

Nadar stated the work-related trauma to Alley's knees and neck produced a permanent impairment rating pursuant to the AMA Guides, and specifically indicated there was no pre-existing active impairment. He clearly stated his opinions within the realm of reasonable medical probability.

We find no error in the ALJ's inference that Dr. Nadar attributed at least some of Alley's current condition to his work at Jet Coal. Dr. Nadar clearly and repeatedly stated his medical opinion that Alley suffered cumulative trauma injuries to his neck and knees. He twice declined the opportunity to apportion some of Alley's current impairment to a pre-existing condition. His findings constitute substantial evidence sufficient to support the finding that Alley sustained cumulative trauma injuries to his neck and knees.

In a somewhat similar argument, Jet Coal next contends the ALJ erred in failing to find Alley suffered pre-existing, active neck and knee conditions. It stresses that Alley had complaints, symptoms, and an actual need for treatment prior to his employment at Jet Coal. Jet Coal attempts to distinguish the present case from Hale, noting there was no prior treatment in that case for the conditions which the employee claimed were caused by cumulative trauma. It again argues there is no evidence that Alley's conditions are any different now than prior to his employment.

In a cumulative trauma injury claim, the date of manifestation for purposes of notice and statute of limitations is the date the claimant is advised by a physician that he has an injury and it is work-related. Consol of Kentucky v. Goodgame, 479 S.W.3d 78, 82 (Ky. 2015). Recently, the Kentucky Supreme Court ruled the employer on the date a cumulative trauma injury manifests is liable for the

entirety of the award stating, “Nothing in KRS Chapter 342 limits the liability of the employer, in whose employ the date of manifestation occurred, to the percentage of the claimant’s work-life spent there.” Hale, 474 S.W.3d at 138. Here, the ALJ determined the manifestation date of Alley’s alleged cumulative trauma injuries is September 5, 2017, the date of Dr. Nadar’s report. Citing Hale, the ALJ concluded Jet Coal is solely liable for Alley’s cumulative trauma injuries because it was the last employer at which Alley sustained cumulative trauma.

There is no portion of the work-related cumulative trauma injury that may be excluded from his award. Had it been successful in proving a manifestation date prior to Alley’s employment with Jet Coal, it still would not have met its burden of proving the conditions were both symptomatic and impairment ratable. While Alley freely acknowledged he was symptomatic for years prior to his employment with Jet Coal, no physician opined the condition was impairment ratable prior to the employment with Jet Coal. Indeed, Jet Coal’s IME physician did not believe Alley presently has any impairment rating for his neck or knees. The ALJ could reasonably conclude the cumulative trauma at Jet Coal contributed to Alley’s conditions. Although Jet Coal contends Alley’s condition is the same as it was before his employment with Jet Coal, Alley testified regarding additional trauma involved with his employment and that his conditions worsened during his employment with Jet Coal. As noted by the ALJ, Dr. Nadar attributed the conditions to cumulative trauma throughout his work history and did not exclude the employment with Jet Coal. The evidence does not compel a finding of a pre-existing active impairment rating.

Finally, Jet Coal argues it cannot be responsible for an injury for which Alley was not an employee on the date of manifestation. Alley was laid off on June 22, 2016. The ALJ determined the disability manifestation date was September 5, 2017, after Alley's employment ceased. Thus, Jet Coal argues his date of injury occurred when he was not an employee of Jet Coal.

We find no error in the ALJ's determination that Jet Coal is responsible for benefits to commence following the cessation of work on June 22, 2016. It is uncontroverted that Alley had no employment after being laid off by Jet Coal. There is no evidence of any non-work related event or cause contributing to his conditions after he ceased working for Jet Coal. In Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835 (Ky. 2009), the Kentucky Supreme Court concluded:

A condition "arises" when it comes into being, begins, or originates. Thus, impairment arises for the purposes of Chapter 342 when work-related trauma produces a harmful change in the human organism. That usually occurs with the trauma but sometimes occurs after a latency period. In either circumstance the authors of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* consider the amount of impairment that *remains* at MMI to be "permanent." The fact that they direct physicians to wait until MMI to assign a permanent impairment rating does not alter the fact that the permanent impairment being measured actually originated with the harmful change. We conclude, therefore, that the compensable period for partial disability begins on the date that impairment and disability arise, without regard to the date of MMI, the worker's disability rating, or the compensable period's duration.

Thus, Alley's impairment may reasonably be determined to arise with his last trauma on June 22, 2016. As the last employer where Alley sustained cumulative trauma,

Jet Coal is liable even though Alley did not become aware of the diagnosis of the cumulative trauma injuries until after ceasing employment with Jet Coal.

Accordingly, the June 8, 2018 Opinion, Award and Order and the June 27, 2018 Order rendered by Hon. Brent Dye, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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